

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Hyla Wagner, Senior Commission Counsel
Luisa Menchaca, General Counsel
Carla Wardlow, Chief, Technical Assistance Division

Date: April 26, 2002

Subject: **Proposition 34 Update: Reporting and Recordkeeping Issues**

Introduction

At the outset of its implementation of Proposition 34, the Commission made a conscious decision to interpret the measure through the public rulemaking process rather than through advice letters. In the year and a half since Proposition 34 was enacted, the Commission has adopted or amended over 40 regulations related to it and issued two opinions relating to its provisions. The major regulations interpreting Proposition 34 that the Commission has adopted are listed in Appendix 1. The Commission made several major policy decisions, first pertaining to the campaign reporting requirements under the new law, then focusing on discrete areas such as outstanding net debt, transfers, carryover, and expenditure limits.

Two chief areas of Proposition 34 regulatory work outstanding are member communications and independent expenditures. These issues are being tackled at upcoming Commission meetings. Although not related to Proposition 34, advertising disclosure is also another chief area the Commission is addressing at this time.

The Commission's work has been quickly implemented as campaign contribution limits and the new disclosure requirements of Proposition 34 took effect at the statewide level in the March primary election. To analyze how well the regulatory framework worked for the March election, as part of its regulatory work for the calendar year, the Commission planned to examine outstanding reporting problems and other areas that need to be addressed before the November election, other than those already scheduled for rulemaking.

It is too soon to tell what major policy issues are raised by full implementation of Proposition 34. To determine what outstanding technical issues may need to be addressed this calendar year, staff surveyed the Technical Assistance, Enforcement and Legal divisions of the FPPC, the Franchise Tax Board, and the Secretary of State. The result was a compilation of several reporting and recordkeeping issues related to Proposition 34, but no major issues surfaced. The issues raised so far will not require changes to the forms before November. As the Commission may recall, strong sentiment

was expressed by the Commission that no changes to the forms be made between the primary and general elections in order to reduce the potential for confusion.

We have summarized the issues into two categories, Reporting and Forms Issues and Recordkeeping. Specific issues that have surfaced are described below for the Commission's consideration. Following the general election, staff will be able to further determine if there are major policy considerations for the Commission.

Discussion

A. Reporting and Forms Issues

As part of Proposition 34's implementation, campaign reporting forms such as the Form 460 were modified following much discussion regarding the specific Proposition 34 reporting requirements and the interaction of the Proposition 34 changes to the law and existing reporting rules. The Commission and the Secretary of State's office worked jointly to implement three statutes that require reports to be filed only electronically. (Sections 85309, 85310, and 85500.)¹ As the two agencies work to implement the new statutes, staff believes that the Commission will face new challenges in the future to streamline procedures and to address questions from local jurisdictions, such as the City and County of San Francisco, whose reporting schemes are closely tied to the state reporting scheme. Some of those issues are outlined below.

1. Electronic Forms - Issue Advocacy Disclosure. Of the three electronically filed reports under Proposition 34, one of the reports has raised novel questions. This is the report filed pursuant to section 85310. Section 85310 requires the reporting of payments of \$50,000 or more for communications that clearly identify a state candidate and are made within 45 days of an election, even though the communication does not expressly advocate election or defeat of the candidate. This section has the potential of causing controversy because it is viewed as capturing reporting of "issue advocacy" by candidates or others, which is in addition to reporting of payments for communications that expressly advocate for or against a candidate or ballot measure.

The reporting requirements under this section are currently embodied in regulation 18539.2² and the report is filed with the Secretary of State's office under the

¹ All references are to the Government Code.

² Regulation 18539.2(a) currently provides that the report must contain the following information:

- (1) The name and address of the person making a payment or a promise of payment totaling \$50,000 or more for a communication described in section 85310(a);
- (2) If the person making a payment or a promise of payment is an individual, his or her occupation and employer;
- (3) The amount(s) of the payment(s) or promise of payment;
- (4) If the person making a payment or a promise of payment is a recipient committee, the identification number issued to the committee by the Secretary of State;
- (5) The date(s) of the payment(s) or promise of payment;
- (6) The name(s) of and office(s) sought or held by the candidate(s) identified in the communication; and
- (7) Identification of amended information.

statute. Since it is a report filed electronically only, the regulation serves the dual purpose of providing the specific filing requirements and guiding the Secretary of State's office in establishing the electronic formats to be used by the Secretary of State's office to implement the filing requirement.

Preliminarily, we observe that no section 85310 reports were filed during the March election. This may indicate that either there was not a lot of issue advocacy campaigning that took place during the primary, that filers are not aware of the new disclosure requirement, or that there is a lack of compliance with the new statute. In addition, it may be that the \$50,000 disclosure threshold is high enough that it will capture disclosure of costly issue advocacy campaigning, such as television ads in a gubernatorial race, but will not capture smaller scale issue advocacy campaigning, such as billboards for a state Assembly or Senate race.

In anticipation of issues that will surface in future elections, the Secretary of State's office requests that the Commission consider amending regulation 18539.2 to require a description of the method of communication for which the payment of \$50,000 or more was made, e.g., broadcast communication, literature and mailings, billboards, or print ads. The Secretary of State believes that requesting this information is consistent with the Act's requirement that committees identify the purpose of campaign expenditures and with the expenditure codes the Commission has provided for that purpose on Form 460, Schedule E - Payments Made.

The Secretary of State added description fields on the electronic report required to be filed under section 85310 and regulation 18539.2, and informed filers these were optional fields. This raises two questions for Commission consideration: 1) does existing Commission regulation 18539.2 capture all of the desired information; and 2) will it be necessary to amend this regulation each time additional information concerning section 85310 is requested? In other words, when it is useful to capture optional (voluntary) information for research and other purposes, but that information is not specifically required by the statute or authorized by the regulation promulgated by the Commission, should the regulation be amended each time? An amendment to regulation 18539.2 would clearly provide regulatory authority for requiring filers to include the description fields. However, other issues with broader implication are raised.

Because this issue advocacy disclosure form is filed electronically only, it currently does not go through the forms authorization process that forms issued by the Commission usually do. Pursuant to requests from the regulated community, in 1996, the Commission adopted regulation 18313 which prescribes a notice and comment procedure for adoption of all Commission forms, instructions and manuals.

Regulation 18313, titled "Forms and Manuals" provides as follows:

"(a) The Commission shall maintain a list of persons interested in its forms and manuals.

(b) No later than 30 days prior to considering a new form or manual, or a revision or supplement to an existing form or manual, the Commission shall mail

changes to everyone on its interested persons list. The changes shall be clearly noted.

(c) The form, manual, revision or supplement shall appear on the next regular meeting agenda of the Commission for adoption.

(d) At that meeting, the Commission may, if three commissioners agree:

(1) Adopt the form, manual, revision or supplement with or without discussion.

(2) Make changes to the form, manual, revision or supplement and adopt it as modified.

(3) Reject the form, manual, revision or supplement.

(4) Schedule an interested persons meeting.”

Recommendation: The Commission may wish to consider in the future the broad issue of whether all forms implementing the Act, including electronic forms filed only through Cal-Access, should be approved by the Commission pursuant to the notice and comment procedure of regulation 18313. A review of this regulation will also serve to address other issues such as whether the regulation should specify that form instructions are subject to the regulatory provisions. Currently this is the staff interpretation. In addition, staff can present the minor amendment to regulation 18539.2 requested by the Secretary of State to the Commission for consideration.

2. Form 460. Several issues, although relatively minor, have surfaced regarding Forms 460 and 410.

a. Reporting by Affiliated Entities. An issue raised by staff is whether regulation 18428 concerning reporting by affiliated entities should be amended to require Forms 410 and/or 460 to show other committees with which recipient committees are affiliated. Given the contribution limits of Proposition 34, it might be useful if the Forms 410 and/or 460 listed committees with which a recipient committee is affiliated. The Form 410 - Statement of Organization requires a sponsored committee to list its sponsor, but it does not require other recipient committees to list any affiliated committees. The Form 460 requires candidates to list all of their controlled committees on the front page. It does not, however, require non-controlled committees (non-candidate committees) to list other committees with which they are affiliated. In contrast, the Federal Election Commission’s statement of organization form requires that a committee list the name and address of any connected organization or affiliated committee.

b. Pre-2001 Committees. The California Political Attorneys Association raised the issue that currently there is no indication on the forms about whether a committee is a pre-2001 committee or not. Thus, if the committee’s disclosure statement shows contributions that are above the limits, it may look like the committee is in violation of the limits when it actually is not, creating misleading disclosure for the public.

The public should be notified that the Proposition 34 contribution limits do not apply to these committees. Perhaps filers can note “Pre-2001 committee – contribution limits do not apply” in parentheses after their name in box 3 of Form 460. In addition,

the Secretary of State may wish to consider adding a notice about this to its CalAccess website.

c. Loan Issues. Several issues were raised concerning loans. The first issue involves the interplay between two Proposition 34 provisions, §85307(b) limiting the amount a candidate may loan his or her own campaign to \$100,000 and §85319 providing that a candidate for state elective office may return any contribution to the donor at any time. Under these sections, it appears that a candidate could contribute a large sum to his or her campaign, and then return all or part of the contribution at any time, circumventing the loan limits. SB 1742 (Johnson) has been introduced to close this loophole.

Another issue concerns candidate contributions to their own campaigns. Before the contribution limits of Proposition 34 were in effect, family members or close friends of a candidate could make unlimited contributions to a candidate's campaign. Given the contribution limits, there may be an increase in family members giving money to an individual who is a candidate for use in the campaign with the candidate subsequently contributing this money to his or her own campaign. This is a violation of the contribution limits about which the Commission may wish to undertake additional education efforts.

The last loan issue raised is a technical one about reporting loans with the correct per election and calendar year cumulative contribution amounts. Candidates asked the Technical Assistance Division many questions about cumulating loans, loan repayments, and loan forgiveness for purposes of the contribution limits and the per election reporting requirements. The Technical Assistance Division has issued instructions and examples about the cumulation issues and will continue to work with filers.

Recommendation: Showing affiliated committees on form 410 or 460 is a useful form change to consider after the November election. The Commission has already directed staff to address the affiliated entities reporting issues. Staff will work with filers on the pre-2001 committee notification and the loan issues.

3. Late Contribution Reports. An issue concerning filing late contribution reports ("LCRs") on the weekend arose at the December 2001 meeting during consideration of permanent adoption of Proposition 34 regulations 18539 (online disclosure of contributions) and 18550 (online disclosure of independent expenditures). Regulation 18116 provides that when reports filed under the Act are due on a Saturday, Sunday, or official state holiday, the deadline is changed to the next working day, except for late contribution reports and late independent expenditure reports. The weekend extension applies to the new \$1,000 and \$5,000 reports added by Proposition 34, but does not apply to the traditional late contribution reports.

Colleen McAndrews of Bell, McAndrews, Hiltachk and Davidian, submitted a letter to the Commission on March 8, 2002, suggesting that the weekend extension be applied to traditional LCRs. She requests that the Commission review the burdens

imposed on all filers by weekend late report filings balanced against the perceived benefits.

Regulation 18116 extends the deadline for filing many reports if the filing date falls on a weekend or holiday. Regulation 18116 states:

“Whenever the Political Reform Act requires that a statement or report be filed prior to or not later than a specified date or during or within a specified period, and the deadline falls on a Saturday, Sunday or official state holiday, the filing deadline for such a statement or report shall be extended to the next regular business day. This extension does not apply to late contribution reports required by Government Code Section 84203, late independent expenditure reports required by Government Code Section 84204, or notice by the contributor of a late in-kind contribution required by Government Code Section 84203.3.”

Ms. McAndrews suggests that traditional late contribution reports should not be excepted out of the next regular business day extension in regulation 18116. She suggests that weekend 24-hour reporting could be preserved for LCRs on the final weekend before the election, but that prior weekends could be excepted out. She points out that many local city clerk’s offices are not open on the weekends to receive and make use of the late reports. Though treasurers can put off opening their mail until Monday, and thus avoid “receiving” contributions over the weekend, often fundraisers are held on Fridays and Saturdays where campaign staff collect contributions on site, resulting in LCRs due on Saturday or Sunday.

Another minor issue that has been raised concerning late reports is a one-day discrepancy between the end of the traditional late contribution report period (§§82036 and 84203) and the 90-day election cycle period added by Proposition 34 (§§85204 and 85309). The late contribution report period does not include the day of the election, but the 90-day election cycle reporting period does. Eliminating this discrepancy, however, would require a legislative change.

Recommendation: As to the weekend filing of late reports, it is recommended that staff review the legislative and regulatory history and relevant Civil Code provisions and report back to the Commission.

4. Occupation and Employer Information. Section 85700 and regulation 18570 provide that a committee shall return not later than 60 days after receipt any contribution of \$100 or more for which the committee does not have on file the name, address, occupation and employer of the contributor. The Franchise Tax Board has expressed a concern that committees might interpret the 60-day period cited in §85700 and regulation 18570 to mean that they have a 60-day grace period for reporting occupation and employer information on contributions. They were concerned that committees might file pre-election statements missing lots of occupation and employer information, and then amend the statements to include the information after the election. The Franchise Tax Board wondered whether it is necessary to clarify that a committee

must report all occupation and employer information that the committee has in its possession at the time the committee first reports the contributions. This interpretation is correct under the current law and regulation 18570.

The new Proposition 34 occupation and employer information rules apply to local as well as state candidates. The Enforcement Division predicted that there might be more compliance problems with this provision at the local rather than the state level.

Recommendation: The Commission and the Franchise Tax Board can closely monitor compliance with the new occupation and employer information provisions over the next year to determine if a problem exists.

B. Recordkeeping

The Commission wanted to know whether there are any changes necessary to the campaign recordkeeping requirements in light of Proposition 34 to assist in enforcement of the Act. From discussions with the Enforcement Division, it is too early to assess at this time what changes to the recordkeeping regulations, if any, may be needed to help enforce the Proposition 34 campaign provisions. Enforcement issues will emerge as Proposition 34 is applied and we see what types of complaints are filed. Enforcement investigators commented that they will need at least a full primary and general election cycle to see what enforcement issues arise. In addition, the Franchise Tax Board audits of campaigns from these elections will not take place until next spring, so the timeline for considering what regulatory changes would assist in enforcement of the Act will be over the next year. However, two issues were raised.

1. Reference Recently Added Recordkeeping Requirements in Regulation 18401. The Legal Division noted that several of the Proposition 34 regulations have added new recordkeeping requirements. For example, regulation 18540 concerning Proposition 34's voluntary expenditure ceilings, requires in subdivision (a)(8) that "[t]he candidate shall maintain records establishing that his or her allocation of campaign expenditures under Government Code section 85400 was consistent with the provisions of the Act and of this regulation." In addition, regulation 18570 regarding occupation and employer information, added the requirement that a committee "maintain in its files a record of the date on which the [occupation and employer] information required by Government Code Section 85700 was obtained, if that date is different from the date the contribution is received."

Recommendation: Although regulation 18401 is not an exclusive list of all the recordkeeping requirements of the Act, it would probably be helpful to treasurers to reference the new recordkeeping requirements in regulation 18401. The staff can include this technical change in its regulatory clean-up packet to be presented to the Commission in June for pre-notice discussion.

2. Expenditure Limits - Exempt Expenditures. Certain expenditures do not count toward the voluntary expenditure ceilings of §85400. The statute provides that campaign expenditures made by a political party on behalf of a candidate are not

attributable to the limits. (§85400(c).) Further, regulation 18540(d) states that contributions to other candidates or committees, costs associated with preparing and filing campaign finance reports required under the Act, candidate filing fees, and costs of ballot pamphlet statements do not count against the voluntary expenditure limits.

The Franchise Tax Board commented that it might be helpful to have candidates keep a record of what expenditures do not count towards the limits. On the other hand, it might be burdensome to make all state candidates keep additional records, if only a small number will make expenditures close to the limits. In addition, the Enforcement Division observed that we need to be cautious about adding new recordkeeping requirements because every time a committee does not comply with the requirement, it adds an audit finding. We could advise committees that anticipate spending close to the expenditure limits to keep records of exempt expenditures for their own benefit.

Recommendation: The Commission and the Franchise Tax Board can monitor whether tracking exempt expenditures presents a problem that merits adding a new recordkeeping requirement.

Summary of Discussion

The primary election has served to identify several minor regulatory and forms improvements that the Commission should address. However, many of these are minor reporting issues that can be handled by staff on an ongoing basis. The one issue that the Commission may wish to consider before the November election is the request from the Secretary of State for the amendment to regulation 18539.2 specifying the contents of the issue advocacy disclosure report. Staff recommends that the Commission be provided an overview of Proposition 34 activity when it considers its regulatory workplan for 2003 in December of 2002.

Attachment